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BEFORE THE
SURFACE TRANSPORTATION BOARD

M & G POLYMERS USA, LLC	)	
Complainant,	)	
v.	)	**Docket No. NOR 42123**
CSX TRANSPORTATION, INC.	)	
Defendant.	)	

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REPLY TO MOTION TO STRIKE

M&G Polymers USA, LLC ("M&G") hereby replies in opposition to the Motion to Strike ("Motion") filed by defendant CSX Transportation, Inc. ("CSXT") on September 30, 2011. With its Motion, CSXT claims that M&G improperly cited to Board precedent and governing law in the M&G Rebuttal Evidence on Market Dominance (filed August 4, 2011). CSXT asks that the Board strike M&G's references to this Board precedent and governing law from the record. As described below, M&G's Rebuttal Evidence was permissible and the Motion should be denied.

I. Standard of Review.

While CSXT did not explicitly set forth the standard of review for its Motion, the discussion at pages 4-5 of the Motion does make an effort to address the standard of review. Nevertheless, CSXT presented an incomplete picture. CSXT repeatedly quoted language about impermissible uses of rebuttal evidence. However, the agency has long recognized that new evidence and new argument can be perfectly proper on rebuttal, and are often accepted, as long as it is responsive to issues raised on reply. For example, in a recent case, the Board denied a

motion to strike complainant Western Fuels' fuel hedging argument, even though fuel hedging was a new argument, because it responded to BNSF's reply evidence. Western Fuels Association, Inc. and Basin Electric Power Cooperative v. BNSF Railway Company, STB Docket No. 42088, slip op. at 5-6 (served Sept. 10, 2007) ("WFA"). Moreover, the rule regarding rebuttal statements "has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument." Potomac Electric Power Company v. CSX Transportation, Inc., STB Docket No. 41989, slip op. at 3 (served Nov. 24, 1997) ("PEPCO").[1]

II. M&G's Discussion of DMIR and the Bottleneck Decisions Was Proper Rebuttal Evidence.

The Motion represents a drastic last-ditch effort by CSXT to salvage its market dominance evidence. Unfortunately for CSXT, however, the Motion merely confirms again, as M&G's Rebuttal Evidence did, that CSXT is market dominant over all 69 lanes at issue in this case. Specifically, CSXT objects to M&G's Rebuttal Evidence on Market Dominance because therein M&G showed that some of the transportation alternatives proposed by CSXT in its Reply Evidence did not constitute true competition for the issue movement under controlling law.

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[1] CSXT also cites to Union Pacific Corporation, Union Pacific Railroad Company and Missouri Pacific Railroad Company – Control – Chicago and North Western Transportation Company and Chicago and North Western Railroad Company, ICC Docket No. 32133, Decision No. 20, slip op. at 15-16 (served Sept. 12, 1994) ("UP-Control-CNW"), to show that a "theory not previously advocated" should be stricken. Motion at 9. That proceeding, however, was in a very different procedural posture from M&G's case, which is a critical distinction. It concerned acquisition of the Chicago and North Western ("CNW") by Union Pacific Railroad ("UP"). Responsive applications seeking conditions were filed by Southern Pacific ("SP") and Chicago, Central & Pacific ("CCP"), to which UP/CNW replied Separately, SP and CCP had filed replies to the control application of UP and CNW. After SP and CCP filed rebuttals in support of their responsive applications, UP/CNW filed a motion to strike. In considering the motion to strike, the dispositive issue was whether the rebuttal evidence filings of SP and CCP in support of their responsive applications improperly addressed the primary control application filed by UP/CNW, rather than the UP/CNW reply to the responsive applications. Id. at 9 ("SP cannot put on its opposition to the primary application now."); Id. at 11 (evidence stricken where UP and CNW "have the right to close the record"). Id. at 7, 8, 10-13, 15-20, and 25. The M&G case does not involve a similar confluence between two related and simultaneous proceedings, where M&G has used its rebuttal in one proceeding to respond to a different proceeding in an attempt to deprive CSXT of its right to close the record in that proceeding.

M&G's citation to Board precedent and federal statutes was entirely in response to the transportation alternatives proposed by CSXT. Hence, its rebuttal was permissible.

Once stripped of its rhetorical flourish, the Motion reveals CSXT is upset that it did not conduct its own legal research to ensure that its own litigation position and evidence met all applicable governing legal standards. If CSXT believed that effective competition exists in any particular lane(s), then it should have refuted M&G's evidence under governing law. CSXT has not done this, and incredibly blames M&G for its failure to do so. The fact that CSXT's evidence has failed is not M&G's responsibility.

A. M&G responded directly to CSXT's Reply Evidence.

In its Rebuttal Evidence, M&G did not alter the basic configuration of its evidence or offer new facts, studies, analyses, or other types of new evidence. Instead, M&G cited to 49 USC § 10709, DMIR,[2] and the Bottleneck Decisions[3] in direct response to specific transportation alternatives proposed by CSXT. See M&G Reb. Ev. at II-B-3-5. M&G showed that those alternatives do not comport with this existing law. In a very detailed fashion, M&G described the specific alternatives proposed by CSXT, and exactly how each alternative failed to meet the existing legal standards. This is permissible rebuttal. See, e.g., PEPCO, slip op. at 3; AEP Texas North Company v. BNSF Railway Company, STB Docket No. 41191 (Sub-No. 1), slip op. at 31 and 37 (served Sept. 10, 2007) ("AEP Texas"); WFA, slip op. at 5-6; South Orient Railroad Company, Ltd. – Abandonment and Discontinuance of Trackage Rights – Between San Angelo and Presidio, TX, STB Docket No. AB-545, slip op. at 2 (served Mar. 26, 1999).

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[2] Minnesota Power, Inc. v. Duluth, Missabe & Iron Range Railway Company, 4 STB 288 (1999). DMIR relies heavily upon 49 USC § 10707, a statute that M&G cited in both its Opening and Rebuttal Evidence.

[3] Central Power & Light Company, et al. v. Southern Pacific Transportation Company, et al., 1 STB 1059 (1996) ("Bottleneck I"); pet. for clarification, 2 STB 235 (1997) ("Bottleneck II"); aff'd, MidAmerican Energy Company et al. v. Surface Transportation Board, 169 F.3d 1099 (8th Cir. 1999)

Whether or not M&G could or should have anticipated that CSXT would propose transportation alternatives in violation of controlling law is not the relevant question. M&G was not required to anticipate all possible transportation alternatives that CSXT might include in its Reply. PEPCO, slip op. at 3 (complainant is not required "to anticipate in its opening evidence every possible defense or criticism of the SAC model"). The proper question is whether M&G's Rebuttal Evidence was new evidence in support of its case-in-chief or a response to issues raised by CSXT's Reply Evidence. Id. ("The Rules of Practice limit '[r]ebuttal statements...to issues raised in the reply statements to which they are directed.' 49 CFR 1112.6. This standard has been broadly interpreted and does not bar the introduction in rebuttal of new, but responsive, evidence and argument."). Indeed, CSXT itself has previously "conceded" that rebuttal is proper where it merely addresses the reply evidence, as opposed to bolstering the opening evidence. CSX Corporation and CSX Transportation, Inc. Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases/Agreements – Conrail, Inc. and Consolidated Rail Corporation, 3 STB 955, 958 (n. 8) (1998).

This is not a situation where M&G seeks to "significantly revise its case-in-chief." Duke Energy Corporation v. CSX Transportation, Inc., STB Docket No. 42070, slip op. at 4 (served Mar. 25, 2003). M&G has not altered the facts or argument in its Opening Evidence. Here, M&G's market dominance arguments do not rise or fall based upon the proper application of DMIR and the Bottleneck Decisions. M&G's core evidence and argument has focused upon multiple other factors, including the configuration of Apple Grove, product quality and integrity, contractual requirements, consignment, customer needs, the use of rail cars for storage, high volumes, and additional personnel costs, among others. Rather, it is CSXT's proposed

alternatives purportedly showing comparable rates to rail transportation that are so impacted, and it is that reply evidence to which M&G properly has directed the contested rebuttal evidence.

The assertion that M&G's Rebuttal Evidence included "new" argument also is undermined by the fact that CSXT recognized the problem with some of the transportation alternatives that it proposed in its Reply Evidence. CSXT made sure to point out that it was trying to find transload locations at or near the interchange point to the contract rail carrier. CSXT Reply at II-36 ("a transload site at the current interchange point"); II-37 ("transload facilities near those movements' destinations"); and II-41 ("transload facility at the current NS interchange"). Similarly, CSXT specifically pointed out alternatives which properly replaced just "[t]he CSXT portion" of a movement. CSXT Reply at II-43. These statements suggest that CSXT was aware of the requirement set forth by 49 USC §§ 10707 and 10709, the Bottleneck Decisions, and DMIR.[4] Given CSXT's acknowledgement of the issue on Reply, the argument made by M&G (and challenged by CSXT in its Motion) cannot be considered "new."

CSXT's failure to identify alternatives that comport with those requirements for some of the issue movements, and instead rely upon alternatives that contravene controlling law, is indicative of the fact that CSXT could not find effective alternatives and decided to look beyond the bounds of controlling precedent in the hope that M&G would not notice. Now that M&G has noticed, CSXT feigns outrage and surprise.

B. M&G's Position Has Been Consistent Throughout this Proceeding.

CSXT expresses great consternation that, in the Opening Evidence, M&G evaluated the cost and competitiveness of certain transportation alternatives that, like many alternatives proposed by CSXT, are not true alternatives under DMIR, the Bottleneck Decisions, and 49 USC

[4] Even if CSXT did not actually recognize the problem, it should have done so. CSXT witness Benton Fisher participated in the DMIR case and submitted testimony as an expert witness. See CSXT Reply at IV-5

§§ 10707 and 10709. See, e.g., CSXT Motion at 5-10. CSXT misses the point. M&G's consistent argument throughout this entire proceeding has been that CSXT possesses market dominance over the issue movements, and that no effective competitive alternatives exist, regardless of whether the Board evaluates just the CSXT segment or the entire movement.[5] No new market dominance evidence was provided on rebuttal to support M&G's market dominance claims. Rather, M&G cited to legal standards showing why CSXT's Reply Evidence fails to defeat market dominance. M&G Rebuttal at II-B-3-5.

The fact that some transportation alternatives considered, and rejected, by M&G in its Opening Evidence also did not comport with the same law that M&G cited in Rebuttal does not make M&G's Rebuttal improper or inconsistent. M&G *agrees* with CSXT's assertion that alternative transportation solely for CSXT's segment of a joint line movement often is less efficient than alternatives for either the entire movement or intermodal alternatives using different interchange points from the issue movement. CSXT Motion at 12-13. But that is the law under DMIR and the Bottleneck Decisions. Nevertheless, when making direct rate comparisons between CSXT's rail transportation and alternative transportation options, M&G compared the most efficient, and thus lowest cost, alternatives regardless if they conformed to DMIR and the Bottleneck Decisions out of an abundance of caution. By evaluating the cost of the most efficient transportation alternatives in its Opening Evidence, M&G took a very conservative approach in the presentation of its market dominance evidence because, if the more efficient alternative does not provide effective competition, neither can a less efficient alternative that does comport with the DMIR and Bottleneck precedents.

[5] M&G presented opening evidence on a wide variety of factors besides transportation costs, including: the configuration of Apple Grove, cost to reconfigure Apple Grove, product quality and integrity, contractual requirements, consignment, customer needs, use of rail cars for storage, high-volume lanes, and personnel costs.

By being conservative, M&G ensured that its Opening Evidence would be relevant regardless whether the Board follows DMIR and the Bottleneck Decisions. In contrast, CSXT's failure to evaluate alternative transportation options that conform to those decisions has exposed it to the consequences of that precedent.

C. CSXT Fails to Differentiate its Reply Evidence from the Inappropriate Alternatives in DMIR.

In a further attempt to salvage its market dominance evidence, CSXT also argues the merits of DMIR, which of course destroys the claim (Motion at 11) that it has been denied the opportunity to respond to M&G's allegedly improper Rebuttal Evidence. CSXT claims that the prohibited transportation alternatives in DMIR are different from the transportation cited by CSXT in its Reply Evidence. As part of this futile effort, CSXT asserts that (1) the alternative considered in DMIR was "hypothetical", "customized", and "exceptional", while the alternatives proposed by CSXT are "similar" to actual transportation used by M&G; (2) the transportation considered in DMIR was improper geographic competition, but the alternatives proposed by CSXT are similar or identical to transportation used by M&G, and represent "one continuous movement"; and (3) applying the legal standard would foreclose CSXT's ability to propose the most efficient alternative transportation. CSXT Motion at 11-13. None of these reasons warrants ignoring the governing legal standard for market dominance.

First, it is irrelevant that CSXT may have proposed transportation alternatives similar to real-world transportation used by M&G. The key point under the statute, as even CSXT appears to recognize, is whether there is "an absence of effective competition from other rail carriers or modes of transportation for the transportation to which a rate applies." 49 USC § 10707(a); CSXT Motion at 13 (n. 9). Whether or not M&G has used a particular transportation method cannot demonstrate effective competition if, as is true with many of the alternatives posed by

CSXT in this case, the method concerns an origin-destination pair different from "the transportation to which [the challenged CSXT rate] applies." DMIR, 4 STB at 292; Market Dominance Determinations – Product and Geographic Competition, 3 STB 937, 946 and 949 (1998).

Second, CSXT is flatly wrong in its suggestion that the alternative conceived in DMIR was not "one continuous movement." In DMIR, the Board plainly stated that the proposed alternative involved the utility "ship[ping] its Laskin-bound coal to Boswell via BNSF and transload[ing] the coal there for subsequent truck transport from Boswell to Laskin." 4 STB at 291. The coal still originated in the Powder River Basin, with a simple transload occurring at Boswell.[6] The alternative proposed by DMIR is no different from many of the alternatives proposed by CSXT. In DMIR, the defendant railroad handled only one part of a joint-line rail movement that also involved BNSF under contract. Similarly, all of the Exhibit B lanes in the M&G Complaint are also joint-line movements, with the non-CSXT portion under contract. Just like DMIR proposed intermodal transportation (with transloading at a location different than the rail interchange) to replace both railroads in a joint-line movement, so too has CSXT proposed similar intermodal transportation to replace a joint-line movement. Thus, the alternative transportation considered in DMIR is squarely on all fours with CSXT's proposed alternatives for M&G's issue movements.

Third, CSXT complains that application of governing law, as explained in DMIR and elsewhere, forecloses the most competitive and most efficient transportation alternatives. CSXT Motion at 12-13. On this point, M&G agrees. But, as explained in DMIR, the Bottleneck Decisions, and 49 USC §§ 10707 and 10709, this result is required by the governing law.

[6] In the alternative proposed by the defendant railroad in DMIR, the coal did not originate at Boswell; indeed, it could not originate there because Boswell was a power plant, not a coal mine.

Consequently, there may not be any efficient or feasible alternatives for the issue movements to which the challenged tariff rates apply.

Of particular note in this final point, CSXT recognizes that many of its proposed alternatives, such as double-transloads, are "less efficient and less competitive with all-rail service than a one-transload option." CSXT Motion at 13. With its Motion, therefore, CSXT has apparently abandoned its prior assertion that double-transloads are competitive with transportation under the challenged tariff. See, e.g., CSXT Reply at II-54-62. Taken to its inevitable conclusion, then, CSXT's Motion represents CSXT's view that the alternatives previously proposed by CSXT for the "Group 2" and "Group 3" lanes (as categorized by M&G's Rebuttal) are less efficient than, and cannot be competitive with, transportation provided using the CSXT tariff. See M&G Reb. Ev. at II-B-17-22.

Although M&G agrees with CSXT that it is often less efficient to try to devise alternative transportation for joint-line movements with a transload at the interchange between CSXT tariff service and another railroad's contract service (rather than a transload at a more convenient location), this is the law.[7] The Board's interpretation of 49 USC §§ 10707 and 10709 in the Bottleneck Decisions and DMIR requires that alternative transportation for such a joint-line movement include a transload at the interchange location. Accepting CSXT's view of the permissible alternatives requires overturning not just DMIR but also the Bottleneck Decisions. Given that the Bottleneck Decisions were judicially affirmed[8] and rely directly upon the Board's interpretation of 49 USC § 10707, the Board would have to provide a "reasoned analysis" to completely revamp its implementation now. Rust v. Sullivan, 500 U.S. 173, 186-187 (1991);

[7] As expressed in the Motion, CSXT disagrees with this governing law, but such a viewpoint goes to the weight of the precedent, not its admissibility. Hi Tech Trans, LLC – Petition for Declaratory Order – Hudson County, NJ, STB Docket No. 34192, slip op. at 2 (served Nov. 20, 2002).

[8] See MidAmerican Energy Company et al v. Surface Transportation Board, 169 F 3d 1099 (8th Cir. 1999).

Borough of Columbia v. Surface Transportation Board, 342 F.3d 222, 229 (3rd Cir. 2003) ("If an agency departs from its own precedent without a reasoned explanation, the agency may be said to have acted arbitrarily and capriciously."); Cross-Sound Ferry Services, Inc. v. Interstate Commerce Commission, 873 F.2d 395, 399-401 (D.C. Cir. 1989). Where agency action results in a policy change, the agency must "display awareness that it *is* changing its position. An agency may not...depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." Federal Communications Commission v. Fox Television Stations, Inc., 556 U.S. ___, 129 S. Ct. 1800, 1811 (2009) (italics in original). "[G]ood reasons" must be shown for the new policy, and an even "more detailed justification" may be required when the "prior policy has engendered serious reliance interests." Id.

D. Governing Law Applies Regardless Whether It Has Been Cited by the Parties.

Whether or not M&G cited to DMIR in its Opening Evidence, the Board still must consider the argument and the cited authorities because they concern Board jurisdiction. Under 49 USC § 10709, the Board does not have jurisdiction over rail transportation pursuant to a contract. Rail Transportation Contracts Under 49 U.S.C. 10709, Ex Parte 676, slip op. at 2 (served Jan. 22, 2010) ("Congress expressly removed all matters and disputes arising from rail transportation contracts from the Board's jurisdiction in section 10709(c)"). The jurisdictional bar applies not just to the rate reasonableness phase of a rate case, but for all "rate complaint purposes." DMIR, 4 STB at 293 ("we will not consider the movement prior to the interchange point for rate complaint purposes because that movement is governed by a rail transportation contract and is thus beyond our regulatory purview under 49 U.S.C. 10709(c)"). This sentiment was also noted in Bottleneck I, 1 STB at 1074:

> Plainly we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract. Regulation of

> the entire through route – even if the contract rate were simply treated as a given that cannot be changed – would indirectly result in review of the contract rate, and Congress has declared the rates for that portion of the through-route service to be beyond our reasonableness jurisdiction.

Therefore, the Board can only evaluate market dominance within the scope of its statutory jurisdiction, which does not include portions of a through movement that are under contract.

Because the Board's jurisdiction is at issue, it may not disregard the argument. "[J]urisdiction cannot arise from the absence of objection." Columbia Gas Transmission Corporation v. FERC, 404 F.3d 459, 463 (D.C. Cir. 2005). See also United States v. Cotton, 535 U.S. 625, 630 (2002) ("subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived"); Kansas City Power & Light Company v. Union Pacific Railroad Company, STB Docket No. 42095, slip op. at 3 (served July 27, 2006); U.S. v. Cotton, 535 U.S. at 630 ("[D]efects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court."). Cf. 16AA Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3974.1 (4th ed. 2008) (on appeal, "a court must determine whether it has subject-matter jurisdiction, even if none of the parties raises the issue in any brief").

E. M&G's Rebuttal Evidence Does Not Prejudice CSXT.

1. M&G did not "induce" CSXT.

CSXT claims that M&G "induce[d]" CSXT to propose transportation alternatives that violated governing law. CSXT Motion at 9. This is incorrect. M&G does not establish CSXT's litigation strategy. Indeed, in the adversarial system of litigation, each party is responsible for its own strategic decisions and conducting its own legal research. Moreover, no inducement was possible because, in its Opening Evidence, M&G clearly stated that none of the transportation

alternatives evaluated by M&G provided effective competition for the issue lanes. The fact that CSXT may have mimicked some of the alternatives considered by M&G cannot be inducement because M&G clearly argued that these same alternatives were not effective competition. If anything, CSXT should have been dissuaded from proposing those same alternatives because M&G had already evaluated them.

Because proceedings before the Board are adversarial in nature, Otter Tail Power Company v. The Burlington Northern and Santa Fe Railway Company, STB Docket No. 42071, slip op. at 2 (served Dec. 13, 2004), each party is responsible for preparing its case, conducting legal research, and developing its legal theories. United States v. Rivas-Macias, 537 F.3d 1271, 1281 (10th Cir. 2008) ("Absent extraordinary circumstances, our adversarial system of justice imposes an abiding duty on each party to take the legal steps necessary to protect his or her own defenses"), citing Cotto v. United States, 993 F.2d 274, 278 (1st Cir. 1993); United States v. Mitchell, 518 F.3d 740, 749 (10th Cir. 2008) ("Ours is an adversarial system of justice. The presumption, therefore, is to hold the parties responsible for raising their own defenses."). Cf. Ackermann v. United States, 340 U.S. 193, 197 (1950) (noting that defendant has a "duty to take legal steps to protect his interest in litigation in which the United States was a party adverse to him"). With its Motion, CSXT erroneously places responsibility for its litigation strategy at the feet of M&G. The Board should reject CSXT's attempt to disclaim its duty to protect its own interests and raise its own defenses.

2. CSXT was not prejudiced by the length of M&G's Rebuttal.

CSXT makes a feeble attempt to contend that M&G's Rebuttal Evidence was improper on the basis of the number of pages included. CSXT Motion at 2. CSXT notes that the qualitative market dominance section of M&G's Opening was 57 pages (129 pages with the lane

summaries), but that the Rebuttal was 133 pages (276 pages with lane summaries). CSXT has provided no authority for its claimed page-count standard for permissible rebuttal. Moreover, any relevant comparison would not be between M&G's Opening and Rebuttal, but between CSXT's Reply and M&G's Rebuttal, because the CSXT Reply is the document to which M&G responded in its Rebuttal. CSXT's Reply section on qualitative market dominance was 76 pages (133 pages with lane summaries, or 192 pages with charts and maps). Moreover, rebuttal evidence is often longer because it necessarily includes a summary of what was previously said on both opening and reply.[9] The key point is not the number of pages, but whether the Rebuttal was responsive to issues raised in the Reply. PEPCO, slip op. at 3; WFA, slip op. at 5-6. On this point, M&G's Rebuttal was entirely proper.

F. The Board Should Reject the Alternate Request of CSXT for Another Round of Evidentiary Filings.

CSXT has asked the Board for an opportunity to respond to M&G's Rebuttal Evidence if it denies the Motion. CSXT Motion at 3. But, CSXT has already argued the legal merits of the contested argument. See CSXT Motion at 11-14. Moreover, another round of evidentiary filings would be futile. It would serve no purpose to permit CSXT to submit evidence of transportation alternatives that it has admitted are less efficient than the ones already proven to be ineffective competitive constraints. See CSXT Motion at 12-13. Establishing yet another round of evidentiary filings would further extend an already lengthy proceeding, not to mention waste the Board's resources. Congress has directed the Board "to provide for the expeditious handling and resolution of all proceedings." 49 USC § 10101(15). Ordering a round of futile evidentiary filings would be contrary to that clear Congressional mandate.

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[9] For example, the Lane Summaries that M&G prepared in Part II-B-3 of its Rebuttal Evidence repeated both M&G's Opening and Rebuttal evidence alongside CSXT's Reply Evidence. Consequently, all of the lane summaries that were a single page in M&G's Opening Evidence expanded to 3-4 pages in its Rebuttal Evidence

Respectfully submitted,

Jeffrey O. Moreno
David E. Benz
Thompson Hine LLP
1920 N Street, N.W., Suite 800
Washington, D.C. 20036
(202) 331-8800

October 14, 2011

CERTIFICATE OF SERVICE

I hereby certify that this 14th day of October 2011, I served a copy of the foregoing upon counsel for defendant CSXT via e-mail and first class mail at the address below:

G. Paul Moates
Paul Hemmersbaugh
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
pmoates@sidley.com
phemmersbaugh@sidley.com

Counsel for CSX Transportation, Inc.

_____
Jeffrey O. Moreno